5-5-2009

State v. Corwin Appellant's Reply Brief Dckt. 34932

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO, Plaintiff-Respondent, v. LARRY DEAN CORWIN, Defendant-Appellant.	)	NO. 34932 REPLY BRIEF

REPLY BRIEF OF APPELLANT

APPEAL FROM THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

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STATEMENT OF THE CASE

Nature of the Case

Mr. Corwin was tried by a jury and found guilty of driving under the influence. Following a bench trial, he was also found guilty of the felony enhancements alleged by the State. Although the district court ordered that a substance abuse evaluation be performed for purposes of sentencing, no such evaluation was ever received. The district court sentenced Mr. Corwin to 10 years, with five years fixed.

Mr. Corwin timely appealed, and asserted that the district court improperly admitted opinion testimony from two law enforcement officers that invaded the province of the jury because this testimony embraced the ultimate question of Mr. Corwin's guilt of the charged offense. He further asserted that the prosecutor committed misconduct that rose to the level of fundamental error when she expressed her personal opinion of Mr. Corwin's guilt during closing argument. Finally, Mr. Corwin asserted that the district court manifestly disregarded Idaho Criminal Rule (*hereinafter*, I.C.R.) 32 when it sentenced Mr. Corwin without the benefit of the substance abuse evaluation that was ordered in this case and required by statute, and further abused its discretion when it denied Mr. Corwin's Idaho Criminal Rule 35 (*hereinafter*, Rule 35) motion requesting that such an evaluation be performed.

In response, the State claimed that the testimony of the officers as to their opinion regarding Mr. Corwin's guilt was not objectionable simply because it embraced an ultimate issue; that Mr. Corwin's claims regarding this testimony were not preserved for appeal; that, in any case, the district court properly exercised its discretion in admitting the testimony; and that any error that may exist was harmless. Regarding

Mr. Corwin's assertion of prosecutorial misconduct rising to the level of a fundamental error, the State asserted that, if the transcript of proceedings is altered so that two sentences are made into one sentence, then there was no comment by the prosecutor as to her personal opinion of Mr. Corwin's guilt. Alternatively, the State asserted that any error as to the challenge statements was not fundamental. Finally, the State claimed that Mr. Corwin, not the district court, had the obligation to provide a substance abuse evaluation for purposes of sentencing. The State did not address Mr. Corwin's Rule 35 motion in which he challenged his sentence, *inter alia*, in light of the absence of a substance abuse evaluation.

This Reply Brief is necessary to address the claims raised by the State on appeal.

Statement of the Facts and Course of Proceedings

The Statement of the Facts and Course of Proceedings were previously articulated in Mr. Corwin's Appellant's Brief. They need not be repeated in this Reply Brief, but are incorporated herein by reference thereto.

ISSUES

1. Did the State's questions regarding whether law enforcement officers believed that Mr. Corwin was intoxicated impermissibly invade the province of the jury?

2. Did the prosecutor's closing remarks at sentencing regarding the prosecutor's personal belief in the guilt of the defendant constitute prosecutorial misconduct?

3. Did the district court manifest disregard I.C.R. 32 when it sentenced Mr. Corwin without the benefit of the substance abuse evaluation that was ordered for purposes of sentencing, and further abuse its discretion when it denied Mr. Corwin's Rule 35 motion that requested such evaluation be actually performed?

ARGUMENT

I.

The State's Questions Regarding Whether Law Enforcement Officers Believed That Mr. Corwin Was Intoxicated Impermissibly Invaded The Province Of The Jury

A. Introduction

Mr. Corwin has asserted on appeal that the admission of expert testimony of several police officers as to their opinion regarding Mr. Corwin's guilt impermissibly invaded the province of the jury and, therefore, the district court abused its discretion when it admitted this testimony over Mr. Corwin's objection. Expert testimony that goes to the ultimate question of the defendant's guilt or innocence has been recognized as improper under Idaho case law interpreting the rules of evidence. Mr. Corwin has not challenged the underlying qualifications of the officers in this case to testify as experts, but rather has challenged the *substance* of that testimony. And admission of this testimony was not harmless in light of the record in this case.

B. The State's Questions Regarding Whether Law Enforcement Officers Believed That Mr. Corwin Was Intoxicated Impermissibly Invaded The Province Of The Jury

The State has made several contentions in relation to Mr. Corwin's claim that the testimony of multiple police officers as to their expert opinion regarding Mr. Corwin's intoxication, and therefore his guilt, impermissibly invaded the province of the jury. The State has claimed: (1) that, "[u]nder Idaho's rules of evidence, the only improper invasion of the province of the jury is where one witness passes upon the credibility of other witnesses"; (2) that, at trial, Mr. Corwin only objected to the officers' testimony as invading the province of the jury, and therefore there was no objection on the basis that

this testimony was improper expert testimony or that the officers were not properly qualified as experts; (3) that the district court did not abuse its discretion in admitting the testimony in light of the holding in *State v. Gleason*, 123 Idaho 62, 844 P.2d 691 (1992) and *State v. Burrow*, 142 Idaho 328, 127 P.3d 231 (Ct. App. 2005); and (4) that any error in admitting this testimony is harmless. (Respondent's Brief, pp.6-15.) Mr. Corwin will address each contention in turn.

First, it is an incorrect statement of law that, "Under Idaho's rules of evidence, the only improper invasion of the province of the jury is where one witness passes upon the credibility of other witnesses." (Respondent's Brief, p.7.) One need look no further than the very first case cited by the State in support of this proposition to determine that it is an erroneous statement of the law.

The State relies on *State v. Hester*, 114 Idaho 688, 760 P.2d 27 (1988), as one of two cases in support of the idea that the only way that expert testimony can invade the province of the jury is by an express comment on the credibility of another witness. (Respondent's Brief, p.7.) However, the actual holding in *Hester* was that expert testimony impermissibly invaded the province by expressing an opinion as to the defendant's guilt of the charged offense – which is the same issue being raised by Mr. Corwin in this appeal with regards to the challenged testimony of the officers. *Hester*, 114 Idaho at 695-696, 760 P.2d at 34-35. (*See also* Appellant's Brief, pp.12-18.) Specifically, the Court in *Hester* held:

> In the instant case, *expert opinion testimony regarding Hester's identity as the abuser only served to impermissibly evaluate the circumstances and render the same conclusion the jury was asked to render by its verdict.* Therefore, the testimony of Jones and Sorini on this issue, the ultimate issue of whether Hester was [the alleged victim's] abuser, was improperly admitted.

Id. at 696, 760 P.2d at 35 (emphasis added). It is abundantly clear from the holding in *Hester* that expert testimony may constitute an impermissible invasion of the province of the jury where that opinion constitutes a comment on the ultimate issue of the defendant's guilt. The State's assertion to the contrary is meritless.

Second, the State correctly notes that there was no objection at trial to the officers' personal qualifications as expert witnesses, and therefore this issue is not preserved for appeal. (Respondent's Brief, pp.8-9.) This assertion would be relevant if this was the claim that Mr. Corwin had raised on appeal, but it is not. Mr. Corwin's assertion regarding the improper admission of the expert testimony was based upon the *substance* of the testimony as an invasion of the province of the jury, and not on the qualifications of the officers. (Appellant's Brief, pp.12-18.) And, as previously noted, it is indisputable that one of the bases being asserted in *Hester* for the inadmissibility of the expert testimony was that this testimony embraced the ultimate issue of the defendant's guilt. While there were other issues raised as to why the expert testimony was improperly admitted, the Court in *Hester* made clear that one of the issues regarding the admission of the expert testimony was "the trial court's admission of Jones's and Sorini's expert opinion testimony that Hester was [the alleged victim's] abuser." *Hester*, 114 Idaho at 695, 760 P.2d at 34. It is further apparent that the admission to the expert testimony under I.R.E. 702 can be objected to on the basis that the testimony invades the province of the jury from the following language in *Hester*:

> Although the field of child abuse may be "beyond common experience," having an expert render an opinion as to the identity of the abuser *is more of an invasion of the jury's function* rather than an "assist" to the trier of fact. *I.R.E. 702.*

Id. Two things are of note from the above quoted passage: (1) the pertinent holding from *Hester* was based on an assertion that the expert testimony was improper because it invaded upon the province of the jury; and (2) the assertion of improper expert testimony on the basis that it invades the province of the jury is a claim that is firmly rooted in the defined limits of expert testimony as outlined in I.R.E. 702.

Contrary to the State's apparent assumption, an allegation that expert testimony was improperly admitted can embrace grounds other than just the qualifications of the witness as an expert. And Mr. Corwin has clearly preserved his argument that the testimony of the officers was improper expert witness testimony because it invaded on the province of the jury.

Third, the State's reliance on *Gleason* and *Burrows* to argue that the district court did not abuse its discretion in admitting the expert testimony is misplaced. First, the issue being resolved by the Court in *Gleason* was whether the district court erred in admitted evidence of the horizontal gaze nystagmus (*hereinafter*, HGN) test administered on the defendant. *Gleason*, 123 Idaho at 65-66, 844 P.2d at 694-695. More specifically, the defendant objected to the admissibility of the HGN test because it lacked a sufficient foundation of scientific reliability to be presented to the jury as evidence of intoxication. *Id.* There was no challenge raised in *Gleason* to the testimony of the officer as to a personal belief that the defendant was too intoxicated to drive on the basis that this invaded the province of the jury. *Id.* This was simply not an issue presented for the *Gleason* Court's resolution. Therefore, any similarity to the expert opinion testimony of the officers in *Gleason* and the officers in this case is irrelevant,

since no issue in *Gleason* was raised as to the propriety of that testimony. *Id.* at 64-66, 844 P.2d at 693-695.

Additionally, as has been noted in the Appellant's Brief, the Court of Appeals decision in *Burrow* did not address the same issue as Mr. Corwin has presented on appeal. (Appellant's Brief, p.16.) But this opinion did discuss, in dicta, the distinction between expert opinion testimony that indicates a defendant's behavior is consistent with intoxication and opinion testimony that a person is, in fact, intoxicated. *Burrow*, 142 Idaho at 331, 127 P.3d at 234. As Mr. Corwin has previously noted in his Appellant's Brief, the discussion of this distinction in *Burrow* is dicta that was discussed in the context of a different issue. (Appellant's Brief, p.16.) But the distinction made by *Burrow* is nonetheless relevant and instructive in this case, where this difference between testimony that opines as to the defendant's *actual* intoxication, versus testimony of whether there were indications *consistent with* intoxication, is squarely before this Court.

Finally, this error was not harmless for the reasons set forth in the Appellant's Brief. (Appellant's Brief, pp.17-18.)

II.

The Prosecutor's Closing Remarks At Sentencing Regarding The Prosecutor's Personal Belief In The Guilt Of The Defendant Constituted Prosecutorial Misconduct

A. Introduction

The State has asserted that the prosecutor's remarks expressing a personal belief in Mr. Corwin's guilt do not, in fact, express the prosecutor's personal opinion when taken in context. However, the "context" asserted by the State is predicated on

an alteration of the transcript so that two sentences become one sentence, and the statement of the prosecutor becomes attributed to a witness. Because there is no authority providing for the State to unilaterally alter the record so as to support a claim on appeal, this argument is without merit. In fact, the State has not filed a motion pursuant to I.A.R. 30.1 to alter or correct the transcript. Therefore, on the record before this Court, the prosecutor's statement is clear and unambiguous, and constitutes an opinion regarding Mr. Corwin's guilt of the charged offense.

B. The Prosecutor's Closing Remarks At Sentencing Regarding The Prosecutor's Personal Belief In The Guilt Of The Defendant Constituted Prosecutorial Misconduct

In this case, Mr. Corwin has asserted on appeal that the prosecutor's statement expressing her personal belief in Mr. Corwin's guilt constituted prosecutorial misconduct that rose to the level of a fundamental error. (Appellant's Brief, pp.18-23.) The State has responded that, given the proper context, the prosecutor's remarks can be interpreted as merely playing the role of the officers in this case and expressing the officer's belief that Mr. Corwin was guilty. (Respondent's Brief, pp.16-17.) However, in doing so, the State urges this Court to alter the plain terms of the transcript so that the prosecutor's statement, "Based in my opinion I believe Mr. Corwin was too – was under the influence and too impaired to drive a motor vehicle," becomes a part of the previous sentence dealing with the opinion of Officer Pittz, rather than standing on its own as is reflected in the transcript. (Respondent's Brief, p.17.) The State further argues that Mr. Corwin has not demonstrated fundamental error based on this same assertion of the context to apply to the prosecutor's remarks. The State's argument focuses on how to interpret this statement "if the punctuation were different," but the transcript as

produced in the record does not bear out the State's assertion. (Respondent's Brief, p.17.)

This Court does review allegations of prosecutorial misconduct based on the statements of the prosecutor in light of the context out of which the statements emerged. *See, e.g., State v. Sheahan*, 139 Idaho 267, 281, 77 P.3d 956, 970 (2003). However, the State has cited no authority for the proposition that this Court may generate a context by altering the transcript so as to merge two separate statements into one single sentence; and further modify the transcript so a statement presented in the first person is actually a quotation from another witness. And a party waives an argument on appeal if either authority or argument is lacking. *State v. Zichko*, 129 Idaho 259, 263, 923 P.2d 966, 970 (1996).

Moreover, such a unilateral alteration disregards the requirements of I.A.R. 30.1, which establishes the required procedure for amendment or correction of the transcript or record on appeal. Under I.A.R. 30.1(b), a party may file a motion for the correction of a statement in a transcript by filing a motion in accordance with Rule 32. I.A.R.30.1(b). Rule 32 requires that a brief statement be provided in support of the motion and that service be made on all parties to the appeal. I.A.R. 32(d). The State has filed no such motion with this Court, nor provided a statement in support of altering the transcript. Therefore, it would be improper for this Court to affirmatively alter the transcript in this case so as to create the context that the State is urging on appeal. And, under the plain language of the transcript, the prosecutor was adding her personal opinion to the opinions already presented of the officers as to Mr. Corwin's guilt. This constitutes

prosecutorial misconduct that rises to the level of a fundamental error. (*See* Appellant's Brief, pp.18-23.)

III.

The District Court Acted In Manifest Disregard Of I.C.R. 32 When It Sentenced Mr. Corwin Without The Benefit Of The Substance Abuse Evaluation That Was Ordered For Purposes Of Sentencing, And Further Abused Its Discretion When It Denied Mr. Corwin's Rule 35 Motion That Requested Such Evaluation Be Actually Performed

A. Introduction

Pursuant to I.C. § 18-8005(9) and I.C.R. 32(f), the district court was required to order and obtain a substance abuse evaluation for purposes of sentencing. The plain language of I.C. § 18-8005(9) creates an obligation on the part of the court to obtain such evaluation for purposes of sentencing. Mr. Corwin specifically requested that this evaluation be performed in his Rule 35 motion, and considered by the court for purposes of examining its sentencing decision in this case. The district court failed to even address this request in its order denying Mr. Corwin's Rule 35 motion, and the State has similarly ignored Mr. Corwin's request in his Rule 35 motion in its arguments on appeal. In light of the statutory requirements, the district court acted in manifest disregard of the requirements of I.C. § 18-8005(9) and I.C.R. 32(f) when it failed to obtain a substance abuse evaluation for purposes of sentencing; and also abused its discretion when it denied Mr. Corwin's request for this evaluation in his Rule 35 motion.

B. The District Court Acted In Manifest Disregard Of I.C.R. 32 When It Sentenced Mr. Corwin Without The Benefit Of The Substance Abuse Evaluation That Was Ordered For Purposes Of Sentencing

The State has asserted on appeal that, once a substance abuse evaluation is ordered, it is the defendant's responsibility to get that evaluation. (Respondent's Brief, pp.20-21.) However, the State has cited to no language from I.C. § 18-8005 in support of this proposition. What is clear is that these reports are deemed mandatory for use at sentencing unless the court waives the requirement of the report based upon specified conditions, none of which are present here. (*See* Appellant's Brief, pp.25-26.) And, in any case where a substance abuse evaluation is not before the district court at sentencing, under the terms of I.C. § 18-8005(9), *treatment shall be presumed to be* necessary, and none was ordered in this case. (Sentencing Tr., p.15, L.9 – p.17, L.2.; Appellant's Brief, pp.25-26.) Additionally, the State has not addressed whether the district court's failure to acquire a substance abuse evaluation in this case constitutes manifest disregard of I.C.R. 32 in light of the contents of, and omissions within, the presentence report. (*See* Appellant's Brief, pp.24-27.)

More important for this Court, the record in this case clearly shows that Mr. Corwin had made efforts at obtaining a substance abuse evaluation which were not fruitful due to his status as being incarcerated. At the time the substance abuse evaluation was ordered, the prosecutor clarified for the district court that Mr. Corwin was incarcerated, and that the evaluator should be informed of that so that the evaluator would know that special arrangements may be needed to perform the evaluation. (Parts II & III Tr., p.43, L.22 – p.44, L.3.) Given that Mr. Corwin was incarcerated during the time between the ordering of the substance abuse evaluation and his sentencing, he

lacked the opportunity to control where and when the substance abuse evaluation would occur.

Additionally, the Presentence Investigation Report (*hereinafter,* PSI) reflects that Mr. Corwin had brought up the fact that a substance abuse evaluation had not been performed to the presentence investigator. (PSI, p.13.) Mr. Corwin's sole purpose in doing so can only be reasonably interpreted as an attempt to rectify the absence of the report, and demonstrates that he was attempting through the resources available to him to make such a report available to the district court. The presentence report itself states, "INSERT DRUG ALCOHOL EVALUATION," which is yet another signal to the district court for the need of this evaluation for purposes of sentencing. (PSI, p.15.)

To clarify the nature of Mr. Corwin's assertions, he is not herein asserting that a defendant may be ordered to participate in a substance abuse evaluation where the defendant has asserted his or her Fifth Amendment rights. Indeed, the district court could not do so based upon applicable law. *See Estrada v. State*, 143 Idaho 558, 563-564, 149 P.3d 833, 838-839 (2006); *State v. Banbury*, 145 Idaho 265, 270, 178 P.3d 630, 635 (Ct. App. 2007). However, under the narrow facts of this case, where the defendant has affirmatively indicated a willingness to participate in, and a desire for, a substance abuse evaluation for purposes of sentencing, and the record affirmatively indicates the need for this report, the district court is under a duty pursuant to I.C. 18-8005(9) and I.C.R. 32 to obtain a substance abuse evaluation for use at sentencing.

In light of the record in this case, and in particular the information contained within and omitted from the presentence report in this case, the district court acted in

manifest disregard of I.C.R. 32 when it sentenced Mr. Corwin without the benefit of a substance abuse evaluation.

C. The District Court Abused Its Discretion When It Denied Mr. Corwin's Rule 35 Motion That Requested That The Substance Abuse Evaluation Be Actually Performed

Mr. Corwin asked for a substance abuse evaluation to be performed for purposes of sentencing in his Rule 35 motion, and noted that he asked for such an evaluation during his interview with the presentence investigator. (R., p.129.) The district court did not even acknowledge this component of Mr. Corwin's Rule 35 motion in its order denying this motion. (R., pp.135-137.) It has been recognized that the failure of the district court to acquire necessary evaluations for purposes of sentencing can be a basis for relief pursuant to a Rule 35 motion. *State v. Izaguirre*, 145 Idaho 820, 822-825, 186 P.3d 676, 678-681 (Ct. App. 2008). (*See also* Appellant's Brief, pp.27-28.)

Under the record in this case, and in light of applicable legal standards, the district court had an obligation to obtain a substance abuse evaluation for purposes of sentencing. And Mr. Corwin properly requested a substance abuse evaluation in his Rule 35 motion, although the court never acknowledged his request. In light of this, the district court abused its discretion when it denied his Rule 35 motion seeking to have such evaluation performed for purposes of sentencing.

CONCLUSION

Mr. Corwin respectfully requests that this Court vacate his judgment of conviction and sentence and remand this case for a new trial. In the alternative, Mr. Corwin asks that this Court vacate the district court's sentence and remand this case to the district court for a new sentencing hearing upon completion and submission of an appropriate substance abuse evaluation.

DATED this 5th day of May, 2009.

SARAH E. TOMPKINS
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 5th day of May, 2009, I served a true and correct copy of the foregoing APPELLANT'S REPLY BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

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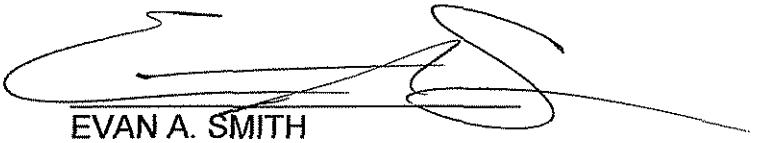

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